



January 7, 2005

FLSA2005-1

Dear *Name*\*,

This is in response to your letter inquiring about the application of the Fair Labor Standards Act (FLSA) to the *Name*\*. You ask whether two *Name*\* employees are “entitled to the protections and benefits afforded under the FLSA, including those relating to overtime, as well as whether FLSA record keeping requirements are applicable and/or being complied with.”

The *Name*\* is composed of an Executive Director and two Managers. You describe it as “a corporate governmental agency constituting a public benefit corporation created by New York General Municipal Law.”

Your concern is the status of the two *Name*\* managers: (a) the Project Manager and (b) the Business Development and Marketing Manager. Both work 37.5 hours per week and take a daily half hour, unpaid, meal break. You state that on the occasions when they have been required to work through their meal periods, they have noted the time as hours worked on their time sheets, yet the Executive Director has changed the time sheets so that they are not paid for those half-hour periods. You say they are paid by salary, yet their salary is reduced if they do not work the full 37.5 hours. You do not mention the amount of the salary or explain the calculation used to reduce it. You do not indicate whether the employees ever work more than 40 hours a week.

You ask whether the FLSA applies to these two managers. As you may know, Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541. Please note that revisions to 29 CFR Part 541 were published as a final rule in the Federal Register on April 23, 2004 (69 FR 22122) and became effective on August 23, 2004 (copy enclosed). Our response is applicable under both the new and prior versions of the regulations.

An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary are met. Since one requirement for the Section 13(a)(1) exemption is that the employee is “paid on a salary basis,” and since the pay of the two managers in question is docked when they work fewer than 37.5 hours including, we assume, if they are suspended or work fewer hours at the employer’s direction due to a lack of work, those managers are not “paid on a salary basis” and, thus, would be ineligible for the exemption, even if the other criteria were met. See sections 541.602 and 541.710 of the Part 541 final rule (69 Fed. Reg. at 22270, 22273; April 23, 2004).

Covered, nonexempt workers, such as the two *Name*\* managers, must be paid at least the minimum wage and their employer must maintain an accurate record of the hours they work. A time record showing that an employee took a half-hour meal break when, in fact, the employee worked through the meal period, is not an accurate time record. Provisions concerning the record keeping requirements of the FLSA may be reviewed in 29 CFR Part 516 and provisions concerning hours worked are discussed in Part 785. Additionally, if more than 40 hours are worked in a week, the employer must either pay the nonexempt employee at a rate of time and one-half the employee’s regular rate of pay or provide compensatory time off. Section 7(o) of the FLSA allows employees of a public agency to receive, in lieu of cash overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required. Information about an employee’s regular rate of pay is found in 29 CFR Part 778, and the provisions for providing compensatory time off in lieu of overtime pay are explained in 29 CFR Part 553.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a



different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

Enclosure

*Note: \* The actual name(s) was removed to preserve privacy.*